APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED DECEMBER 15, 2004

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 03-21025

Yolanda FRANK,

Plaintiff-Appellant,

VERSUS

HARRIS COUNTY,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas, Houston Division

(4:99-CV-2383)

Before BARKSDALE, GARZA and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:*

Plaintiff-Appellant Yolanda Frank ("Frank"), a former deputy for Defendant-Appellee Harris County (the "county"), appeals the district court's summary judgment dismissal

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

of her 42 U.S.C. § 1983 claim. Frank also appeals the district court's grant of judgment as a matter of law on her Title VII *quid pro quo* harassment and retaliation claims, 42 U.S.C. § 2000e *et seq.* We AFFIRM.

BACKGROUND

Frank was hired on February 1, 1997, to serve as a deputy constable, under the supervision of Constable A.B. Chambers ("Chambers"), in the Absent Student Assistance Program division ("ASAP"), a contract program with the Houston Independent School District. Based on the affiliation with the school district, ASAP employees were hired for a limited period of one school year and let go at the end of each year. Employees submitted new employment applications for each following school year. Accordingly, Frank was terminated at the end of the year on May 11, 1998, and rehired on July 29, 1998, for the 1998-99 school year. Once rehired, Frank entered into a new 90-day probationary period, consistent with policy. Frank was terminated on October 16, 1998, within the 90-day probationary period. The parties dispute the reason for Frank's termination. Frank claims she was terminated for rejecting, yet not reporting, the numerous sexual advances of Constable Chambers. Frank describes at least six incidents of unwanted and offensive sexual advances and touchings she endured from Chambers. The county responds that Frank was terminated because of some five incidents of insubordination or failure to obey orders during her 90-day probationary period.

Frank filed suit against the county, alleging that Constable Chambers sexually harassed her on the job and

that she was wrongfully terminated. The county filed a motion for summary judgment as to all claims. The district court granted the county's motion for summary judgment on Frank's § 1983 claim and denied summary judgment as to the sexual harassment and retaliation claims arising under Title VII. By written memorandum and order, the district court held that: (1) Frank was an employee of Harris County; (2) Constable Chambers, as an elected official, was not an employee of Harris County; (3) Frank failed to establish a genuine issue of material fact as to whether the county had a well-settled custom or policy causing her injury and therefore that summary judgment was properly granted to the county on the § 1983 claim; (4) a genuine issue of material fact precluded summary judgment as to Frank's sexual harassment claim on a *quid pro quo* theory; and (5) a genuine issue of material fact precluded summary judgment as to Frank's retaliation claim.

The surviving Title VII claims were tried to a jury, and a verdict was rendered for Frank in excess of $400,000. After the jury returned its verdict, the county reurged its motion for judgment as a matter of law under Fed. R. Civ. P. 50, and the district court granted the county's motion by written memorandum and order. The district court reiterated its prior determination of the employment status of the individuals—that Frank was an employee of the county and Chambers, as an elected constable, was not an employee of the county. Then the district court granted judgment as a matter of law to the county on both Frank's *quid pro quo* harassment claim and retaliation claim.

Appendix A

DISCUSSION

Frank argues that three issues require reversal and remand. As explained here, we disagree.

I. Summary Judgment Properly Entered on § 1983 Claim

First, Frank argues the district court erred in granting summary judgment to the county on her § 1983 claim. This Court reviews the grant of summary judgment *de novo* and uses the same standard as does the district court in evaluating the motion, examining the record in the light most favorable to the nonmovant, here, Frank. *See Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

In order for the county to be liable under § 1983, Frank must show, among other things, either the unconstitutional action of policymakers or an unconstitutional policy or custom. *See Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992). The district court correctly determined that Frank failed to raise a genuine issue of material fact as to whether any official policy or custom governed the alleged conduct and whether Chambers was the final policy maker. *See Rhode v. Denson*, 776 F.2d 107 (5th Cir. 1985) (holding elected constable not the final policymaker and therefore unconstitutional acts of elected county official not chargeable

against the county); *see also Drain v. Galveston County*, 979 F. Supp. 1101 (S.D. Tex. 1997) (holding county cannot be held liable for conduct of elected official constable under § 1983 because he is not final policymaker).

Frank argues on appeal that her case is distinguishable from those relied upon by the district court because Constable Chambers admitted in deposition testimony that he was the final policymaker, creating an issue that should have been submitted to the jury. The county disputes that Chambers so testified and argues that, even if he did, such testimony is merely a legal conclusion which is contrary to established law. As a matter of law in this Circuit, an elected county constable is not, absent specific facts not present in this case, the final policymaker such that his unconstitutional conduct may be chargeable against the county. *See Rhode*, 776 F.2d at 109-10.

> The determining factor, however, is neither that a constable is elected by voters from a subunit of the County nor that the commissioner's court controls his salary. The critical circumstance is that . . . a constable . . . was not given that discretion, or range of choice, that is at the core of the power to impose one's own chosen policy. It is true that a constable possesses a limited range of choice, which is essential even to virtually ministerial tasks. But a constable's range of choice is no greater than that, for example, of a peace officer who must decide whether to arrest for a misdemeanor committed in his presence.

Id. at 109.

Chambers's testimony is not controlling on the issue of whether, as a matter of law, he was the final policymaker. Moreover, Frank did not adduce evidence or argument, beyond this testimony, to support a finding that an unconstitutional custom or policy of sexual harassment existed. Because Frank failed to submit a genuine issue of material fact on the question of whether an unconstitutional custom or policy of sexual harassment existed, the district court properly granted judgment to the county on the §. 1983 claim.

II. Judgment as a Matter of Law on Frank's Title VII Claims

Next, Frank appeals the district court's grant of judgment as a matter of law under Rule 50 as to her Title VII claims for both *quid pro quo* harassment and retaliation. This Court reviews the grant of a Rule 50 motion *de novo*, applying the same standards as the district court applied and considering all the evidence in the light most favorable to the jury's verdict. *Resolution Trust Corp. v. Cramer*, 6 F.3d 1102, 1109 (5th Cir. 1993). "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party." Fed. R. Civ. P. 50(a)(1).

A. Frank's Title VII quid pro quo harassment claim

In determining that judgment should be entered for the county on Frank's Title VII *quid pro quo* harassment claim,

the district court made several initial findings, each now challenged by Frank. First, the district court found, initially on the motion for summary judgment and again— but without new evidence—on the Rule 50 motion, that Frank was employed by Harris County. The court applied the hybrid economic realities/control test as described in *Bloom v. Bexar County*, 130 F.3d 722 (5th Cir. 1997), and per this Court's instruction, analyzed the control factor under Texas law. Finding that the county exercises considerable control over deputies (e.g., salary and benefit provisions, tax withholding, and establishment of terms and conditions of employment), Frank was correctly held to be an employee of Harris County for purposes of Title VII.

Next, the court determined that Chambers was not employed by the county, primarily because he is an elected official who is not subject to the civil service laws of the state government. *See* 42 U.S.C. § 2000e(f). For purposes of Title VII, the Equal Employment Opportunity Act of 1972 provides that elected officials are not employees. *Id.* Frank argued to the district court and argues now on appeal that the county can be liable for Chambers's conduct—irrespective of his employment status—because he was Frank's supervisor. For this proposition, Frank relies upon *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). *Burlington* does not support Frank's argument in this regard because the supervisor in *Burlington* was an employee of the defendant employer, a private corporation. 524 U.S. at 747. In *Faragher*, the Court considered a governmental employer, but again, the supervisor was an employee. 524 U.S. at 780 ("This case calls for identification of the

circumstances under which an employer may be held liable under Title VII . . . for the acts of a supervisory employee."). Neither case supports Frank's position.

This Circuit has recognized that employers may be liable under Title VII for the conduct of non-employees in the workplace when the employer knows of the harassment but fails to act. *Garziano v. E.I. Du Pont De Nemours & Co.*, 818 F.2d 380, 387 (5th Cir. 1987). Based upon Chambers's status as a non-employee, Frank may state a Title VII claim against the county for Chambers's unconstitutional and tortious conduct, only if the county knew or should have known of the conduct and failed to take immediate and appropriate corrective action. *See* 29 C.F.R. § 1604.11(e).

The district court found that Frank adduced no evidence of the county's knowledge. The district court, in its order regarding summary judgment, believed that Frank filed her EEOC charge on January 22, 1998, thereby permitting time for the EEOC and Texas Commission on Human Rights to inform the county of the problem and conduct investigation. But to the contrary, at trial the undisputed fact emerged that Frank did not file her first complaint regarding Chambers's conduct until February 1999, four months after her employment ended. By Frank's own testimony, she did not report the offensive conduct until after her termination. Also, Frank did not report the conduct to the human resources department, to any of her supervisors, to the district attorney's office, or to the mental health program. Therefore, the district court's original assumption that the county had knowledge of the problem was incorrect; and in the subsequent order regarding the Rule 50 motion, the district court corrected this inaccuracy.

Frank argues that another individual's prior cause of action, in which the plaintiff complained of Chambers's conduct, *Moore v. Harris County*, No. 98- 01776 (S.D. Tex. filed June 5, 1998), provided the requisite knowledge to the county to support *quid pro quo* liability for a non-employee's conduct. The district court rejected this argument because *Moore* resulted in a judgment for Chambers on the merits, and therefore did not advance Frank's argument, and because the evidence of the existence of other complaints against Chambers was admitted solely for the purposes of showing Chambers's motive, opportunity, or intent to sexually harass Frank.

Even if the county knows or should know of harassment once a suit is filed and some evidence of harassment is presented, the *Moore* case is, on this record, insufficient to reverse the judgment for the county because no other evidence of the county's knowledge was presented and, most importantly, Frank does not argue that the testimony or depositions or other evidence presented in *Moore* put the county on notice of Chambers's conduct. Instead she merely argues that the case's existence is sufficient to provide notice. We disagree. On this record, we affirm the district court's judgment as matter of law on Frank's Title VII claim for harassment by a non-employee.

B. Frank's Title VII retaliation claim

The district court also entered judgment as a matter of law for the county on Frank's retaliation claim. To state a claim for retaliatory discharge under Title VII, Frank must show that: (1) she engaged in a protected activity; (2) the

employer took an adverse employment action against her; and (3) there was a causal connection between the protected activity and that adverse reaction. *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 519 (5th Cir. 2001).

The court reversed the jury's verdict on this claim because it determined Frank failed to engage in a protected activity. A protected activity is "opposition to any practice rendered unlawful by Title VII, including making a charge, testifying, assisting, or participating in any investigation, proceeding, or hearing under Title VII." *Id.* (citing 42 U.S.C. § 2000e-3(a) and *Evans v. City of Houston*, 246 F.3d 344, 352-53 (5th Cir. 2001)). The district court found that Frank, by her own testimony, did not participate in a protected activity, that is, filing an EEOC complaint, until after her termination.

On appeal, Frank argues that the protected activity she engaged in was her "express rejection" of Chambers's sexual advances. But Frank provides no authority for the proposition that a single "express rejection" to Chambers constitutes as a matter of law a protected activity for purposes of retaliation. Also, Frank offers no explanation or evidence in support of the required element of causal connection. To demonstrate causation, Frank must adduce evidence that "but for" the protected activity, the adverse employment action would not have occurred. *See Mota*, 261 F.3d at 519 (internal quotation marks and citations omitted). Frank fails to explain on appeal, as below, how her opposition to Chambers's advances, which by her own testimony consisted largely of unexpressed disapproval and was not reported to the county or the EEOC prior to termination, caused her ultimate termination.

Therefore, we affirm the district court's grant of judgment as a matter of law on the retaliation claim.

CONCLUSION

Having fully considered the briefs, record on appeal and oral arguments of the parties, we conclude the district court properly entered judgment for the county on both the motion for summary judgment and the motion for judgment as a matter of law.

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED SEPTEMBER 19, 2003

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-99-2383

YOLANDA FRANK,

Plaintiff,

VS.

HARRIS COUNTY,

Defendant.

MEMORANDUM OPINION

Plaintiff is Yolanda Frank, a former deputy constable for Precinct 7 in Harris County, Texas. Frank alleges that Harris County, through former Constable A.B. Chambers, an elected official, is liable for unlawful sexual harassment, retaliation and deprivation of civil rights under 42 U.S.C. § 1983.[1] The case was tried to a jury from April 7, 2003 through April 11, 2003. The jury returned a verdict in favor of Frank, and the

1. The Court granted Defendant's summary judgment motion on Frank's § 1983 claims, but denied summary judgment on the sexual harassment and retaliation claims

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County has renewed its motion for judgment as a matter of law pursuant to Rule 50.[2]

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2. Federal Rule of Civil Procedure 50 provides in pertinent part:

(A) Judgment as a Matter of Law

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(B) Renewing Motion for Judgment after Trial: Alternative Motion for New Trial: If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment-and may

(Cont'd)

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The Court's previous denial of a motion for summary judgment does not prevent the possibility of a subsequent motion for judgment as a matter of law. *See Gross v. Southern Railway Company*, 446 F.2d 1057, 1060 (5th Cir. 1971). This rule recognizes that "at times the issues may be such that only after the agony of a full-blown trial may it authoritatively be determined that there was never really a decisive issue of fact at all." *Robbins v. Milner Enterprises, Inc.*, 278 F.2d 492, 497 (5th Cir. 1960).

In determining a Rule 50 motion the court must review the entire trial record in a light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. *Casarez v. Burlington Northern/SantaFe Co.*, 193 F.3d 334, 336 (5th Cir. 1999). The standard for

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> alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:
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> (1) if a verdict was returned:
>
> (a) allow the judgment to stand,
>
> (b) order a new trial, or
>
> (c) direct entry of judgment as a matter of law; or
>
> (2) if no verdict was returned:
>
> (a) order a new trial, or
>
> (b) direct entry of judgment as a matter of law.

analyzing a motion for judgment as a matter of law[3] is well-settled in the Fifth Circuit:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence – not just the evidence which supports the non-mover's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question.

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3. In 1991, Rule 50 of the Federal Rules of Civil Procedure was amended. Pursuant to amended Rule 50, the "motion for directed verdict" and "motion for judgment notwithstanding the verdict" are now called "motions for judgment as a matter of law." *See Miller v. Rowan Companies, Inc.*, 55 F.Supp. 2d 568, 572 n. 3 (S.D. MS 1998).

> However, it is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Boeing Company v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). This Court does not have the benefit of the trial transcript and must rely upon its own observation of the trial proceedings and the briefing of the attorneys. Pursuant to the standard set forth by the Fifth Circuit, the Court concludes that a reasonable trier of fact could not have found as the jury did in this case and grants Harris County's motion.

The following facts were adduced at trial through the uncontested testimony of witnesses and through documents received into evidence. Plaintiff, Yolanda Frank, was hired[4] on February 1, 1997 to serve as a deputy constable at Harris County Precinct No. 7. The County is organized in a military-style fashion and as a deputy constable, Frank was required to take and follow orders from Precinct 7's Chief Deputy, Captain, and Sargent, as well as other officers seated above her in the chain of command. Precinct 7's highest ranking officer was A.B. Chambers, who was elected as the Constable of Precinct 7 during the relevant time period.[5]

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4. Prior to this time, Frank volunteered as a reserve deputy for Harris County.

5. Chambers served as the Constable of Precinct 7 from 1973 through 2000. When Chambers lost his bid for re-election in 2000, he retired. On the date of trial, Constable Chambers was approximately eighty-seven years old. Chambers admits that he was in good health at the time he ran for re-election and during the relevant time period for this case.

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Frank served in Precinct 7's Absent Student Assistance Program Division ("ASAP"), a contract program with the Houston Independent School District ("HISD"). Because ASAP was funded by HISD, ASAP employees were not hired on a continuing basis. Rather, the employees would be hired for the limited time period of one school year and let go at the end of each school year. At the beginning of the next school year, individuals could submit new applications for employment. There was no guaranty or obligation, however, that an ASAP employee would be rehired the following year. If rehired, the employee would enter into a new 90-day probationary period, which was regularly reinstated at the beginning of every contract year.

In accordance with ASAP hiring practices, Plaintiff's initial employment was terminated in May 1997. She was then rehired in August 1997 and July 1998. When Frank was first hired in February 1997, and each time she was rehired, she received and signed employee compensation forms from Harris County. The County was responsible for paying Frank's salary, issuing her paychecks, and withholding taxes from her salary. She also signed three separate documents, one for each hire, that stated that she received, read, understood, and agreed to abide by the Harris County Personnel Regulations Manuel, which contained Harris County's sexual harassment policy and showed employees what procedures to take to report incidents of sexual harassment.

Plaintiff maintains that she was unlawfully terminated by Harris County because she consistently rejected numerous, unspecified, sexual advances made by Constable Chambers.

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At trial, Frank testified that the first incident of sexual harassment occurred in December 1996, or January 1997, while Frank volunteered as a reserve deputy, and the second incident occurred in February 1997, after she had been hired as a deputy constable. Although Frank testified she was harassed at least three times prior to May 1997, Frank returned to work in August 1997. During that summer, Frank adnuts that she did not seek alternative employment. Frank also testified that from August 1997 to May 1998, she was sexually harassed by Chambers at least seven times. According to Frank's testimony, she did not ask Constable Chambers to stop the harassment until March 1998, and he did not adhere to her request. Despite the harassment and Chambers refusal to stop, Frank admits that she did not seek alternative employment during the summer. In August 1998, Frank returned once again to Harris County's ASAP division.

Frank testified that each time she was harassed by Chambers, the same pattern or sequence of events occurred: (1) Constable Chambers called Frank into his office; (2) once Frank appeared in his office, he would "circle" Frank; (3) after "circling" Frank, Chambers would attempt to kiss and touch Frank inappropriately. According to Frank's testimony, she was "shocked" each time she was harassed and suffered from severe mental anguish as a result of the harassment. There is no evidence or trial testimony that Frank ever fought back, sought different employment, or took advantage of the County's programs for psychiatric care to help her cope with her alleged mental anguish resulting from these incidents. The record also shows that Frank failed to report the alleged sexual harassment to anyone at Precinct 7, including the human resource's department; failed to report

the incident to the district attorney's office; and failed to follow the County Personnel Regulations Manual with regard to sexual harassment even though she knew that she needed to report the incidents to Officer Wells. Frank admits, and it is uncontroverted, that she only told her fellow co-workers about the alleged harassment. The first actual report of sexual harassment did not occur until February 1999, when Frank filed her EEOC charge, approximately four months after her employment with Harris County was terminated.

Harris County alleges that Frank was terminated because of her failure to follow orders, not because she refused Constable Chamber's alleged sexual advances. The County provides evidence of five incidents involving insubordination, failure to obey orders, failure to report to duty, and failure to follow County rules regarding personal use of County vehicles occurring on August 17, 1998, August 22, 1998; August 29, 1998, September 25, 1998, and October 9, 1998. The result of these incidents eventually led to Plaintiffs termination October 16, 1998, a date within the 90-day probationary period for the 1998-1999 ASAP contract.

At the close of Plaintiff's case; Harris County moved for judgment as a matter of law. Harris County's motion is based upon the following three arguments: (1) Plaintiff Yolanda Frank was not an employee of Harris County; (2) A.B. Chambers was not an employee of Harris County; and, (3) A.B. Chambers was not Harris County's agent. The Court took the matter under advisement and Defendant proceeded with its case. At the close of trial, the County re-urged its motion for judgment as a matter of law. The Court now writes to address the motion.

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Harris County first argues that Frank cannot be classified as an employee of the County. In the Memorandum & Order (Instrument No. 38) on Defendant's summary judgment motion, this Court concluded otherwise and found that Frank is a Harris County employee. In so doing, the Court applied the summary judgment evidence to the hybrid economic realities/control test as described in *Bloom v. Bexar County, Texas*, 130 F.3d 722 (5th Cir. 1997) to determine if the County is an employer under Title VII. The Court specifically noted that the Fifth Circuit, in *Oden v. Oktibbeha County, Mississippi*, 246 F.3d 458 (5th Cir. 2001) established that state law is crucially important to the determination of whether a county qualifies as an "employer" of a deputy under Title VII. Because control is the most important factor in the test, the Court specifically noted that Texas exerts substantial control over its deputies by (1) determining if the constable has shown that it is "necessary to appoint a deputy in order to properly handle the business of the constable's office that originates in the constable's precinct," *Tex. Loc. Gov't. Code Ann. & 86.011(a)*; (2) determining and paying their salaries, *Tex. Loc. Gov't. Code Ann. §§ 152.001 152.011*; (3) withholding taxes and making payroll deductions; (4) determining the total number of deputy constables that can be appointed, *Tex. Loc. Gov't Code Ann. §§ 151.002, 151.003*; (5) specifically reviewing, approving, or denying each of the constable's appointments, *Tex. Loc. Gov't Code Ann. §§ 151.002, 151.003*; (6) granting a constable the authority to appoint a deputy after the constable has specifically identified the person he wishes to appoint, *Tex. Loc. Gov't. Code Ann. §§ 86.011(a) & 151.003*; and, (7) reviewing all necessary paperwork and setting a new salary if a deputy constable is promoted, *Tex. Loc. Govt. Code Ann. §§ 152.001,*

152.011. The Court also noted that in a similar case, *Moore v. Harris County* (H-98-1776); the Honorable Ewing Werlein, Jr., United States District Judge for the Southern District of Texas, was also presented with exactly the same specific question of whether a deputy constable of Precinct 7, the same position held by Frank, qualifies as an employee of Harris County. Judge Werlein also answered this question affirmatively.

In its renewed motion, Harris County once again asserts that Frank has not satisfied the Fifth Circuit's hybrid economic realities/common law control test. However, Harris County fails to provide any new issues of law or fact in its motion, thus leaving no reason for this Court to depart from its earlier reasoning. The Court writes now only to supplement its earlier order after having had the benefit of trial.

The trial evidence conclusively shows that Harris County possessed requisite control over Frank's employment because it paid Frank's salary, provided benefits, withheld taxes, and established the terms and conditions of her employment. The evidence also showed that Frank was given a copy of and was subjected to Harris County's employee regulations and that Harris County provided Frank with her employee's compensation forms during her employment.

After reconsidering this issue, the Court also finds that Frank is an employee of Harris County pursuant to the plain language of Title VII:

> (a) The term "**person**" includes one or more individuals, **governments, governmental**

> **agencies, political subdivisions**, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers. (b) The term "**employer**" means a person engaged in an industry affecting commerce who **has fifteen or more employees for each working day in each of twenty or more calendar weeks** in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 US.C. § 2000e(a), (b) (Emphasis added). The trial evidence undisputedly shows that Harris County is a "person" because it is a government, governmental agency, and/or political subdivision whose work affects commerce, employs the requisite number of employees, and is not excluded under any of the exceptions listed in 42 U.S.C. § 2000e(b). It is undisputed that Harris County employs more than five hundred employees. Moreover, both the Fifth Circuit and

Southern District of Texas have already concluded that Harris County qualifies as an employer for county deputy constables for Title VII purposes. *See Rutherford v. Harris County*, 197 F.3d 173 (5th Cir. 1999); *Moore v. Harris County* (H-98-1776).

In its renewed motion, Harris County also challenges Plaintiffs assertion that Constable Chambers is an "employee" or "agent" of the County. The Equal Employment Opportunity Act of 1972 provides that elected officials are not "employees" unless these individuals are subject to the civil service laws of a State government. 42 U.S.C. § 2000e(f). In its previous Memorandum & Order (Instrument No. 38), this Court found that because Constable Chambers is an elected official, he is not considered an "employee" of Harris County under Title VII. Nonetheless, the Court concluded that Harris County could be found liable for Constable Chamber's actions pursuant to 29 C.F.R. § 1604.11(e). It states:

> An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

Appendix B

Although the EEOC Guidelines are not controlling, they represent a body of experience to which courts may resort for guidance. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976). This particular guideline has been utilized by a number of federal courts, including the Fifth Circuit, to recognize that employers may be liable for harassment committed by non-employees in the workplace where the employer knows of the harassment but fails to act. *Garziano v. E.I. Du Pont de Nemours & Co.*, 818 F.2d 380, 387 (5th Cir. 1987) ("Federal law imposes a specific duty upon employers to protect the workplace and the workers from sexual harassment, including redressing *known occurrences of sexual harassment*. "(Emphasis added.)); *Kudatsky v. Galbreath Co.*, 1997 U.S. Dist. LEXIS 14445, * 12-13 (S.D.N.Y. 1997) ("It is increasingly recognized that employers may be liable for harassment committed by nonemployees in the workplace where the employer knows of the harassment but fails to act." (Emphasis added.)); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1027 (D. Nevada 1992); *Jarman v. City of Northlake*, 950 F. Supp. 1375 (N.D. Il. 1997)(where plaintiff alleged that an elected official sexually harassed her, the court noted potential liability for the employer) (citing *Hallberg v. Eat'N Park*, 1996 U. S. Dist. LEXIS 3573, *34-35 (W.D. Pa. 1996) (specifically noting that the employer must have knowledge of the harassment and then fail to take corrective action in order to be held liable); *Magnuson v. Peak Technical Serv., Inc.*, 808 F. Supp. 500, 512-13 (E.D. Va. 1992) (noting that the EEOC emphasizes the employer's knowledge of the harassment); *Moffett v. Gene B. Click Co.*, 621 F. Supp. 244, 272 (N.D. Ind. 1985) (noting that a parties' supervisor status is a nonissue because the Court must focus on the employer's

knowledge and whether or not it immediately took corrective action); *Whitaker v. Carney*, 778 F.2d 216, 221 (5th Cir. 1985) (noting potential employer liability for the acts of non-employees); *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) (citing § 1604.11(e) and stating that "the environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers to the workplace")).

Hence, under 29 C.F.R. § 1604.11(e), Plaintiff must prove that Harris County knew or should have known about the alleged sexual harassment suffered by Frank as a result of Constable Chambers. The Court's examination of the summary judgment evidence revealed that Plaintiff provided no evidence concerning Harris County's knowledge of the alleged harassment to Frank. Nonetheless, when the Court issued its Memorandum & Order (Instrument No. 38), it reasoned that Harris County would necessarily have some knowledge regarding the alleged sexual harassment between Constable Chambers and Frank through the filing of her complaint with the EEOC and the Texas Commission on Human Rights (TCHRA) because the TCHRA requires administrative investigation and attempts at conciliation before a complaint is afforded to the courts, TEX. LAB. CODE ANN. §§ 21.201-.207, .209-210 (Vernon Supp. 1996). Harris County would have therefore been aware of the Chamber's unwelcome conduct even if Plaintiff had never specifically filed a claim with Harris County.

At that time, however, the Court was under the impression that Frank filed her EEOC charge on January 22, 1998. This is incorrect. According to Frank's own testimony,

the first time she filed a complaint regarding the alleged harassment was February, 1999, four months after her employment with the County was terminated. Frank also confirmed that she never filed a report with the County's human resources department, failed to tell any of her supervisors at Precinct 7 about the harassment, failed to report the harassment to the district attorney's office, failed to take advantage of the County's mental health program despite complaints of severe mental anguish problems, and failed to report the sexual harassment to Officer Wells, although she admitted that she knew she was supposed to report such incidences to that individual. Additionally, all of the evidence and testimony presented at trial were consistent with Frank's testimony that the first time she reported sexual harassment was in February 1999.

The only proper remedy left to this Court is to grant Defendant's motion for judgment as a matter of law. .As explained by the Fifth Circuit, "Judgment as a Matter of Law should not be granted unless `the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion-" *Palasota v. Haggar Clothing*, 2003 U.S. App. LEXIS 18171, *11 (September 3, 2003) (quoting *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 229, 235 (5th Cir. 2001). Plaintiff's only argument regarding Harris County's knowledge is derived from the fact that Constable Chambers was accused of sexually harassing another Precinct 7 employee in another case, *Moore v. Harris County* (H-98-1776), in which Constable Chambers prevailed on the merits. Because Constable Chambers was found not liable for sexual harassment in the Moore case, that case does not

advance Plaintiffs position. This evidence was admitted at trial for the limited purpose of showing Chambers' motive, opportunity, or intent to sexually harass Frank. The jurors were specifically instructed that "Evidence that Constable Chambers sexually harassed an employee other than Mrs. Frank on another occasion is not evidence or proof that Mrs. Frank was sexually harassed by Constable Chambers." *Court's Jury Instructions, Special Interrogatory No. 1.* Given that this is the only evidence offered by Plaintiff to show that Harris County either knew or should have known that Frank was being harassed, that it cannot be used to prove harassment, and that Constable Chambers was found not liable, there is no evidence to support the jury's findings that the County should be liable on the sexual harassment claim.

As a matter of law, the jury's findings on the retaliation claim should be overturned as well. To prevail on a claim for retaliatory discharge under Title VII, 42 U.S.C. § 2000e-3(a), a plaintiff must show that (1) she engaged in an activity protected by Title VII, (2) the employer took an adverse employment action against her, and, (3) there was a causal connection between the protected activity and that adverse reaction. *Mota v. The University of Texas Houston Health Science Center*, 261 F.3d 512, 519 (5th Cir. 2001); *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995). An employee has engaged in activity protected by Title VII if he has "opposed any practice made an unlawful employment action' 'by Title VII or if he has "made a charge, testified, assisted, or participated in any manner of investigation, proceeding, or hearing" under the statute. 42 US.C § 2000e-3(a); *Mota*, 261 F.3d at 519. "Adverse employment actions" includes only "ultimate employment

decisions . . . 'such as hiring, firing, granting leave, discharging, promoting, and compensating.'" Id. The plaintiff must demonstrate that he had at least a reasonable belief that the practices he opposed were unlawful. *Mayberry*, 55 F.3d at 1092; *Long v. Easylield College*, 88 F.3d 300, 304 (5th Cir. 1996); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981). To demonstrate causation, plaintiff must demonstrate that "but for" the protected activity, the adverse employment action would not have occurred. *Mota*, 261 F.3 d at 519. In the instant action, Frank, by her own uncontroverted testimony, did not participate in a protected activity until after her employment with Harris County was terminated. Therefore, as a matter of law, Plaintiff cannot prove causation and Defendant's motion should be granted.

On a final note, the Court writes to discuss an issue that was first presented in the parties' post-trial briefs.[6] Although the Court's holding does not turn upon this issue, it is included here with the express purpose of supplementing the Court's previous findings. Plaintiff, in an attempt to prove that Chambers is an employee or agent of the County,[7] argues that Texas law provides that constables are subject to the civil service laws of Texas and cites TEX. LOC. GOV'T CODE ANN. §§ 158.001 (Vernon 2003) (which provides that an "employee" is a person included in the coverage of county

6. This issue was first raised by the Plaintiff and later responded to by Harris County.

7. Under 42 U.S.C. § 2000e(f), elected officials cannot be considered employees unless they are subject to the civil service laws of a State government, governmental agency, or political subdivision.

civil service system as the result of an election held under Section 158.007), Section 158.007 (providing that Harris County voters may elect to maintain the county civil service system that judicial notice is taken is maintained), and Section 86.0021 (defining Constable eligibility qualification and not providing for term limitations so Constables are within the civil service system). Harris County provides evidence, however, that Plaintiffs blanket assertions are "totally baseless" because (1) no county civil service system of the type described in TEX. LOC. GOV'T CODE ANN. §§ 158.001-158.015 exists; (2) the Commissioner's Court of Harris County has never adopted an order creating a county civil service system in accordance with TEX. LOC. GOV'T CODE ANN. § 158.003; and, (3) the Commissioner's Court of Harris County has never called an election on the question of the creation of a county civil service system in accordance with TEX. LOC. GOV'T CODE ANN. § 158.004. These facts are provided through the affidavit of Beverly B. Kaufman, the County Clerk of Harris County who serves as the clerk of the Commissioner's Court and is the chief election official of Harris County. Part of her duties include keeping the Commissioner's Court's books, papers, records, and effects in accordance with the provisions of TEX. LOC. GOV'T CODE ANN. § 81.003. In light of this evidence, and Plaintiff s failure to offer any evidence[8] indicating otherwise, the Court

8. Plaintiff also argues that (1) Harris County has an "implied" county civil service system because the County has a population of over 1.8 million people; and, (2) the existence of Harris County's implied county civil service commission is evidenced because the County has adopted Personnel Regulations that encompasses some of the same rules that could be enforced by a civil service commission. (Cont'd)

supplements its earlier conclusion that Constable Chambers is not an "employee" of the County.[9]

Accordingly, the Court

ORDERS that Defendant Harris County's Renewed Motion for Judgment as a Matter of Law (Instrument No. 72) is **GRANTED**.

SIGNED at Houston, Texas, this 18th day of September; 2003.

s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

(Cont'd)
There is no evidence to support the existence of an "implied" county civil service system or that a county civil service system could be created in such a manner. Plaintiff s only evidence is TEX. LOC. GOV'T CODE ANN. § 158.008(e), which merely states that "A member of the commissioner's court of a county with a population of 1.8 million or more *is not prohibited* from being appointed to the civil service commission." (Emphasis added). Contrary to Plaintiff's blanket assertions, this statute does not establish the existence of an implied county civil service system. The only evidence presented on this issue was presented by the County, and it shows that no such county civil service system exists.

9. The Court also notes that the term "employee", as defined in TEX. LOC. GOV'T CODE ANN. § 158.001(2) "does not include a person who holds an office the term of which is limited by the constitution of the state." The term of office for a county constable is limited by Article 5, § 18 of the Texas Constitution. Hence, even if Harris County did have a county civil service system. Constable Chambers would not qualify as an employee.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 19, 2005

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-21025

YOLANDA FRANK

Plaintiff - Appellant

v.

HARRIS COUNTY

Defendant - Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before BARKSDALE, GARZA, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

Appendix C

ENTERED FOR THE COURT:

s/ Harold R. DeMoss
United States Circuit Judge